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IN THE
SUPREME COURT OF THE UNITED STATES

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *ET AL.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF OF HISTORIANS OF THE CIVIL RIGHTS ERA WILLIAM H. CHAFE, DAVISON DOUGLAS, CHARLES PAYNE, TOMIKO BROWN-NAGIN, KENNETH MACK, RISA GOLUBOFF, KEVIN KRUSE AND MATT LASSITER AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are historians and law professors who specialize in U.S. civil rights history, including the desegregation of American elementary, middle, and high schools. In this brief, amici provide the Court with an overview of the historical context in which the school assignment policies under challenge have been developed to assist the Court in resolving the issues presented.

Amici include William H. Chafe, Dean of the Faculty of Arts and Sciences, Vice Provost for Undergraduate Education, and Alice Mary Baldwin Professor of History at Duke University; Davison Douglas, Arthur B. Hanson Professor of Law at the William & Mary College of Law; Charles Payne, Director, Department of African and African American Studies and Professor of History at Duke University; Tomiko Brown-Nagin, Professor of Law and History and F. Palmer Weber Research Professor at the University of Virginia; Risa Goluboff, Associate Professor of Law at the University of Virginia School of Law; Kevin Kruse, Associate Professor of History at Princeton University; and Matt Lassiter, Associate Professor of History at the University of Michigan.[2]

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1 Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

2 Institutional affiliations are provided for purposes of identification only. The views expressed in this brief are those of the individual amici and do not reflect the views of the institutions at which they teach.

SUMMARY OF ARGUMENT

At issue is whether politically accountable school boards have the discretion to adopt plans that encourage the development of racially integrated schools. Public school boards in Seattle and Jefferson County, Kentucky ("the school boards") have adopted such policies to combat racial isolation – the disproportionate absence or presence of students of a given race in a particular school. Responding to widespread public support for pursuing the educational benefits that flow from reducing racial isolation, the school boards developed the school assignment policies under challenge here ("the policies"). Amici submit that the policies, which recognize school children's race as one of many factors considered in school assignments, should be understood in the context of the nation's development of universal public education and the long struggle to overcome the legacy of racially segregated schools. The policies are fully consistent with the Court's education and school desegregation jurisprudence, which has emphasized the importance of local, politically accountable control of schools and of states' roles as laboratories of social experimentation in the field of education.

The historical circumstances from which the polices emerged must inform the Court's assessment of whether they pass strict scrutiny because "context matters" when interpreting the Equal Protection Clause. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). The school boards formulated the policies in view of the nation's long history of educational discrimination against African Americans and widespread resistance to the desegregation mandate issued by the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954).

For decades, the Supreme Court, in tandem with the lower federal courts, imposed school desegregation on white

communities in which resistance to *Brown* ran deep. Since the era of initial resistance to *Brown*, however, "there has been a massive and continuing movement of the American public from overwhelming acceptance of the principle of segregated schooling . . . toward acceptance of the principle of integrated schooling." Howard Schuman *et al.*, Racial Attitudes in America 103 (1997). This evolution in thinking is an outgrowth, in part, of the desegregation of schools and public accommodations accomplished by the Supreme Court and the U.S. Congress. *See id.* at 197 (noting that those who have experienced integrated social spaces are more likely to support integrated schools). More than 90 percent of Americans now support the goal of school integration. *See id.* at 126, 246-249.

The policies demonstrate that citizens in Jefferson County, Seattle, and the many other districts in which voluntary school desegregation programs are in place no longer require judicial intervention to strive for *Brown*'s ideal of equality in education. Across the country, many local communities now embrace the value of racially mixed student bodies of their own accord.

It would be ironic, indeed perverse, if the Court were to quash the democratic consensus in support of school desegregation that now exists in local communities throughout the nation. For that consensus is an outgrowth of the Court's own jurisprudence. The school boards' voluntary efforts to achieve racially diverse student bodies mark the success of the Court's effort to implement *Brown*, the decision that constitutional scholars and legal historians widely view as one the Court's finest achievements.[3] After

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[3] *See, e.g.*, Jack M. Balkin, *Brown v. Board of Education*: A Critical Introduction, in What *Brown v. Board of Education* Should Have Said 185-200 (Jack M. Balkin ed., 2001) (*Brown* "is the single most honored opinion in the Supreme Court's corpus"); Morton J.

the public has internalized the ideals for which *Brown* stands, a decision by the Court calling into question voluntary public initiatives in support of integrated schools would undermine one of its greatest legacies.

The following overview of the nation's transition away from segregated education illuminates the relationship between the Supreme Court, in its role as expositor of constitutional norms, and societal acceptance of the principle of equality in education. Within this context, the policies should be understood as constitutionally permissible attempts to combat racial isolation and fulfill *Brown*'s promise.

ARGUMENT

I. The Voluntary School Assignment Policies At Issue Are Local Responses To The Struggle Against Racial Segregation And Reflect The Historical Role Of Public Schools As Engines Of Democracy And Opportunity.

The policies challenged here are consistent with the responsibility of public schools to prepare "students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Bd. of Educ. v. Pico*, 457 U.S. 853, 868 (1982). When they function properly, public schools do more than teach pupils to read, write, and figure: they equip students with the skills necessary to participate as informed voters in our democracy, socialize young people to live in an

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Horwitz, The Warren Court and the Pursuit of Justice 15 (1998) (describing *Brown* as "perhaps the most important judgment ever handed down by an American Supreme Court"); J. Harvie Wilkinson III, From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954-1978 6 (1979) (describing *Brown* as maybe "the most important political, social and legal event in America's twentieth-century history").

increasingly diverse nation, and teach them to treat those of different backgrounds with respect. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests.") (quotation marks and citation omitted); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (recognizing "public schools as an assimilative force by which diverse and conflicting elements in our society are brought together on a broad but common ground") (quotation marks omitted).

The Court has "acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" *Pico*, 457 U.S. at 864 (quoting *Ambach*, 441 U.S. at 76-77); *see also Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."). The policies aim to prepare Jefferson County and Seattle students to function in our increasingly diverse society, and are faithful to the goals and purposes of American public schools.

A. The Development Of Universal Public Education In America.

Although the Framers did not include any provisions relating directly to public education in the Constitution, they understood from the nation's earliest days that the democratic republic could not survive without an informed, educated citizenry. Thus, Thomas Jefferson proposed that the Virginia legislature pass a "Bill for the More General Diffusion of Knowledge," which would have established a system of

public schools in the commonwealth; on three occasions between 1779 and 1817, the legislature rejected the bill. *See* Thomas Jefferson and Education in a Republic 22-23 (Charles Flinn Arrowood ed., 1930).[4] Jefferson lamented the "snail-paced gait" in educational progress, *see* School: The Story of American Public Education 25 (Sarah Mondale and Sarah B. Patton eds., 2001) ("Mondale & Patton"), but Virginia's failure to develop free, public education for its citizens was typical of the states in the 17th and into the 18th centuries. Indeed, "free public education was virtually nonexistent in the late 18th century. . . . Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold." *Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

In the North, tireless efforts to establish systems of "common" schools on the part of reformers like Horace Mann yielded some fruit. By 1860, approximately two-thirds of northern white children attended some type of school. Davison M. Douglas, Jim Crow Moves North: The Battle Over Northern School Segregation, 1865-1954 60 (2005). But the situation for black children was far more bleak. During the antebellum era, many northern states either excluded blacks altogether from the common schools or else

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[4] Jefferson also proposed spending federal funds "to the great purposes of public education." Donald Warren, To Enforce Education 26 (1974). Other leaders of the time, including Benjamin Rush and Noah Webster, recognized that the new democracy required an effective education system, and advocated the use of public funds to support one. *See* Allen Hansen, Liberalism and American Education in the 18th Century 48-64 (1965); *see also* Richard W. Riley, *The Role of the Federal Government in Education – Supporting a National Desire for Support for State and Local Education*, 17 St. Louis U. Pub. L. Rev. 29, 31 (1997).

relegated them to inferior, racially separate schools. *See id.* at 12-60. Moreover, in much of the antebellum South, educating blacks constituted a criminal offense. *See generally* Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society 1780-1860 196-97 (1983).

The doors of educational opportunity opened ever so slightly to black Americans during the era of Reconstruction. Some northern states, including Indiana and Illinois, permitted black children to attend public schools for the first time. *See id.* at 65-68. In 1865, Congress created the Freedmen's Bureau, which founded schools for freed blacks. The Bureau played a role in establishing or supporting 4,300 schools, including various colleges and universities. *See* Marvin H. Lett, Grutter, Gratz *and Affirmative Action: Why No "Original" Thought?*, 1 Stan. J. Civ. Rts. & Civ. Liberties 417, 435-36 (2005). At the same time, the readmission of several southern states in Reconstruction was contingent on their adoption of constitutional provisions requiring the development of public education systems. *See* Mondale & Patton at 47. Nevertheless, the process of creating free, publicly supported education for all Americans yielded few early dividends, and universal education remained elusive in the post-Civil War era.

By the turn of the twentieth century, however, there had been explosive growth in the development of "common" schools. Expenditures on public schools rose from $69 million in 1870 to $147 million in 1890, and enrollment increased from 7.6 million to 12.7 million in the same timeframe. *See* Mondale & Patton at 58. The number of students enrolled in public high schools doubled every decade from 1890 to 1930. *See id.* at 64. All states had established universal free education systems by the middle of the twentieth century.

But African Americans could not attend these schools on the same basis as whites. Public schools throughout much of the nation were *de jure* segregated by race until the Court found this practice unconstitutional in *Brown v. Board of Education*. The *Brown* Court recognized the crucial role schools play in transforming children into citizens, and that a unitary society could not be produced by a divided school system:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

347 U.S. at 493. *Brown* constituted an unprecedented turning point in the nation's constitutional, political, and educational history.

B. Evolution From Resistance To *Brown v. Board Of Education* To Desegregated Schools.

Brown precipitated a period of massive, often violent, resistance that recalled the era of Civil War and Reconstruction in nineteenth-century America. A bewildering number and variety of public and private individuals and organizations opposed *Brown*. In 1956, 101 U.S. Representatives signed the "Southern Manifesto," a declaration that *Brown* constituted a "clear abuse of judicial

powers" and commended "those states which have declared their intention to resist integration by any lawful means." Jack Bass, Unlikely Heroes 65 (1981); *see also* Jack Greenberg, Crusaders in the Courts 213-14 (1994). Other congressmen proposed bills attacking the Supreme Court and threatening to strip it of jurisdiction over matters relating to "states' rights." Greenberg at 214.

The governors and legislatures of most former Confederate states united in defiance of *Brown*, promising to use every "legal means" to preserve segregated schools. The legislatures met in special sessions and passed a plethora of laws designed to thwart integration. *See* Michael J. Klarman, From Jim Crow to Civil Rights 330-334 (2004); Bass at 117-118. These acts included pupil placement laws, laws suspending compulsory school attendance, and laws nominally "privatizing" the public schools. Of these devices, the pupil placement laws represented the greatest impediment to desegregation. Facially neutral, these laws nevertheless discriminated against black students who wished to attend desegregated schools, requiring them to undergo a burdensome application process that included intelligence and psychological testing. *See* Klarman at 329-333; Bass at 118.

Civic groups also played a pivotal role in the resistance. White citizens' councils, often described as an "up-town" or "buttoned-down" Ku Klux Klan, led the effort to thwart *Brown*. *See* Neil McMillen, The Citizens Council: Organized Resistance to the Second Reconstruction vii-viii, 11 (1971). The councils often included business, civic, and religious leaders. They exhorted whites to oppose *Brown* and threatened blacks who supported desegregation with economic reprisals. *See id.* at 208-211; John Dittmer, Local People: The Struggle for Civil Rights in Mississippi 46-49, 59-60 (1994). Worst of all, whites violently resisted school desegregation in many cities – pummeling blacks who

attempted to break the color line with fists, sticks, knives, and bricks. Some of the most sustained and shocking episodes of violence occurred in Little Rock (1957), New Orleans (1960), and Boston (1974). *See* Klarman at 326-329; Bass at 126-135; Ronald P. Formisano, Boston Against Busing 1-3, 75-82 (2004). For opponents of racial equality, *Brown* was an instance of judicial overreaching that could be nullified in the court of public opinion or by state legislators. *See* Bass at 117-118, 128-135.

The Court responded to the opposition's vilification in decisions that asserted the Court's supremacy and its obligation to interpret the Constitution and demand compliance with its edicts. In *Cooper v. Aaron*, the Court mandated compliance with *Brown* in the face of Governor Orval Faubus's use of the state militia – with the full backing of the state legislature and local white parents and students – to block desegregation of the Little Rock, Arkansas schools. 358 U.S. 1, 16-18 (1958). The Court answered the question whether the district court in Little Rock could delay desegregation in the face of "extreme public hostility" with a resounding no. *Id.* at 12. Quoting Chief Justice John Marshall's proclamation in *Marbury v. Madison* that "it is emphatically the province . . . of the judicial department to say what the law is," 5 U.S. (1 Cranch) 137, 177 (1803), the unanimous *Cooper* Court held that *Brown* could neither be "nullified openly and directly" by state officials, "nor nullified indirectly by them through evasive schemes for segregation." 358 U.S. at 17-18.

The Court expanded on *Cooper*'s principle of judicial supremacy by mandating compliance with *Brown* during the 1960s and 1970s. In a series of cases, the Court rejected school board plans that delayed, impeded, or resulted in only

token desegregation.[5] To speed the desegregation of Southern schools, the Court endorsed the pairing and clustering of non-contiguous school zones and approved the use of busing where necessary to achieve integration. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26-30 (1971). And the Court made clear that *Brown*'s mandate of integrated, unified school systems was not applicable only in the South, expanding the reach of its desegregation jurisprudence to schools nationwide. *See, e.g., Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208-09 (1973) (finding that intentional segregation by school board in one portion of Denver school system created prima facie case of unlawful segregation in other parts and shifted burden to authorities to prove that segregation was not unlawful).

Implemented through the lower federal courts and coupled with federal executive and legislative branch actions, the Court's desegregation jurisprudence broke Jim Crow's chokehold on the nation's public schools. *See* Brian K. Landsberg, Enforcing Civil Rights 139-141 (1997) (discussing how Department of Heath, Education, and Welfare regulations implementing title VI of the Civil Rights Act of 1964 advanced school desegregation); Bass at 253-255, 264. By 1976, 37% of African American students in the South attended majority white schools; virtually none had done so in 1954. *See* Gary Orfield and Chungmei Lee,

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[5] *See, e.g., Green v. New Kent Cty.*, 391 U.S. 430, 437-38 (1968) (holding that school boards had affirmative duty to desegregate and finding ineffective freedom-of-choice plans unconstitutional); *Monroe v. Bd. of Comm'rs of City of Jackson, Tenn.*, 391 U.S. 450, 459-60 (1968) (rejecting desegregation plan that delayed transition to unitary system); *Griffin v. Cty. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 231-32 (1964) (holding that closing public schools while supporting private schools for whites constituted equal protection violation).

Brown at 50: King's Dream or Plessy's Nightmare? 19 (The Civil Rights Project, Harvard University 2004). The Court and other branches of the federal government had brought about a second Reconstruction of the public schools.

C. Retrenchment And The Return Of Racial Isolation.

In the last two decades, the trend toward diverse schools that began with *Brown* has been reversed. During this period, the incidence of racial isolation has increased in school districts across the country. *See* Erica Frankenberg and Chungmei Lee, Race in American Public Schools: Rapidly Resegregrating School Districts 3-4 (The Civil Rights Project, Harvard University 2002); *see also* Gary Orfield and Susan E. Eaton, Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education* 53-55 (1996); Gary Orfield and John T. Yun, Resegregation in American Schools 5-6 (The Civil Rights Project, Harvard University 1999). Students' exposure to peers of other races has declined throughout the nation, and the South, in particular – which saw the greatest strides towards integration after *Brown* – has since 1986 experienced some of the most rapid re-segregation of school districts. *See* Frankenberg & Lee at 4; Orfield & Eaton at 53.

Conditions in the South are illustrative of this pattern of backsliding. In 1954, only .001% of black students in the South attended majority white schools. *See* School Resegregation: Must the South Turn Back? 29 (John Charles Boger and Gary Orfield eds., 2005). Following *Brown*, the number of African American students attending majority white schools in the South steadily increased to about 2% in 1964, 37% in 1976, and 43% in 1986. *Id.* In recent years, however, the number of black students attending majority white schools has steadily dropped – to 39% in 1991, 37% in 1994, 35% in 1996, 33% in 1998, and 30% in 2001. *See id;*

see also Orfield & Lee at 19. The reasons for this pattern vary from state to state, but the overall resegregative trend is clear.

Against the backdrop of increasing racial isolation in public schools, and in recognition of the educational benefits that racially diverse schools produce, local school boards in various states have adopted voluntary policies designed to reduce the likelihood that students attend racially isolated schools. It is in this context that we examine the local experiences in Jefferson County and Seattle that gave rise to the policies under challenge here.

II. The Policies Reflect A Democratic Consensus In Support Of Quality, Integrated Schools After Years Of Discrimination And Resistance To Integration In Jefferson County And Seattle.

A. Discrimination And Desegregation In Jefferson County.

As in so many other areas, it took federal court action to integrate the dual school systems in Louisville and Jefferson County, Kentucky. Kentucky was slow to establish schools for African American students; for example, Jefferson County did not have a public high school for blacks until well into the twentieth century. Denied adequate state support, African American leaders built religious and other private schools for the education of their children. *See* Omer Carmichael and James Weldon, The Louisville Story 40-41 (1957); Frank L. McVey, The Gates Open Slowly: A History of Education in Kentucky 146-151 (1949); R.B. Atwood, *Financing Schools for Negro Children from State School Funds in Kentucky*, 8 J. of Negro Edu. No. 4, 660-663 (Oct. 1939); Scott Cummings, *Race Relations and Public Policy in Louisville*, 27 J. of Black Studies No. 5, 615, 637 (May 1997).

Jim Crow maintained a tight hold on the public schools that eventually were established for African Americans in Kentucky. By statute, Kentucky required "each school board [to] maintain separate schools for the white and colored children residing in the district." *See* U.S. Commission on Civil Rights, School Desegregation in Louisville, Kentucky 56 (1976) ("U.S. Commission"). The City of Louisville and Jefferson County maintained separate school systems, with race and class marking the boundary between the city and suburban systems. Blacks predominated in the relatively poor city system; whites predominated in the wealthier, suburban system. The blacks who might have attended county schools were bused out; prior to 1956, the county paid the city to accept black students at Central High School in Louisville. *See id.* at 1. Schools for African Americans were uniformly inferior to schools for whites, with black schools receiving lower than average per pupil and capital expenditures. *See* C.H. Parrish, *The Education of Negroes in Kentucky*, 16 J. of Negro Edu. No. 3, 355-360 (Summer 1947); Atwood at 663-664. The dual systems ended their compulsory segregation policies during the 1956-1957 school year. *See* U.S. Commission at 56.

But racially isolated schools remained. The freedom-of-choice and geographic zoning plans put into place in Louisville and Jefferson County after the end of formal segregation resulted in only token desegregation. Assignment, transfer, busing, and site selection policies kept the races apart in the schools. *Id.* at 17, 57-63. Racial isolation steadily increased in Louisville in the decades following the school system's token integration, reaching a ten-year high during the 1971-72 school year. In that year, 51 of 67 schools in Louisville were characterized by extreme racial isolation, with either a 90-100% white majority or a 90-100% black majority. *See* Commission on Human

Rights, Commonwealth of Kentucky, Louisville Retreats to Segregation 2-11 (1972).

Meaningful desegregation occurred in Louisville and Jefferson County as a result of efforts by the U.S. Department of Health, Education, and Welfare and the Court's decisions in *Green*, 391 U.S. at 430, and *Swann*, 402 U.S. at 1. *See* U.S. Commission at 55-66. The process began in 1975, after the U.S. District Court for the Western District of Kentucky, at the direction of the Sixth Circuit Court of Appeals, issued a decision merging the city and suburban schools systems and instituting a busing program to disperse black and white students to racially mixed schools. *See* U.S. Commission at 73-79, 83-89; *see also Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cty.*, 489 F.2d. 925, 930-32 (6th Cir. 1973); *Hampton v. Jefferson Cty. Bd. of Educ.*, 72 F. Supp. 2d 753, 757-764 (W.D. Ky. 1999) (recounting history of school desegregation litigation).

Local whites initially resisted the court's desegregation order, sometimes violently. A journalist for Louisville's *Courier-Journal* described the situation in 1975:

> When a federal court . . . ordered Jefferson County Public Schools to stop the segregation of Black and White students, it lit a powder keg of emotions. Those emotions exploded that summer with a ferocity that shook the town . . . . The constant blast of auto horns. The sight of angry mobs silhouetted by fires in the streets. The pungent order of tear gas. The gnawing anxiety as we wondered what would happen.

Cummings at 638 (quoting M. Wines, *Busing: Five Years Later*, Courier-Journal, May 12, 1980, p. 1) (quotation marks omitted). Crowds of white protesters hurled epithets and

pelted with eggs the buses that brought African American students from inner-city schools to white suburban ones. White hostility and violence toward blacks reached such a fever pitch that the National Guard was called in. *See* Marcus Wohlsen, *Busing's Legacy*, Courier-Journal, Sept. 4, 2005, at 1A. Student enrollment in private and parochial schools increased, as did enrollment in the school districts surrounding Jefferson County that were not a part of the desegregation order. *See* Cummings at 638.

Over time, however, community attitudes changed and Jefferson County's school system achieved the distinction of having one of the nation's lowest rates of racial isolation. In 2000, the federal district court dissolved the 25 year old desegregation decree, after concluding that the school board had undertaken a good-faith effort to eliminate segregation and noting that Jefferson County's desegregation program was "nationally acknowledged as one of the most thorough and successful desegregation plans in the nation." *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358, 369-70 (W.D. Ky. 2000). In 2004, on the fiftieth anniversary of *Brown*, Harvard University researchers cited Kentucky schools as the most integrated in the nation. This was due in large part to Jefferson County's city-suburban desegregation plan, which was called a "model" for the rest of the nation. *See* Chris Kenning, *Brown v. Board of Education; Louisville Schools Lead in Integration*, Courier-Journal, May 16, 2004, at 1A.

A critical element in the success of the Jefferson County school desegregation program is overwhelming parental support for officials' efforts to maintain racially diverse schools in spite of the termination of court supervision of the system. *Id.* While it was court-ordered school desegregation that inspired the gradual transformation in racial attitudes that accounts for widespread citizen support for the school board and its race-sensitive pupil

assignment policy, today a substantial majority of Jefferson County citizens supports the goal of achieving racially integrated schools in the absence of judicial oversight. A survey conducted in 2000 by the University of Kentucky found that 67% of parents believe that a school's enrollment should reflect the overall racial diversity of the school district. *See* Sam Dillon, *Schools' Efforts on Race Await Justices' Ruling*, N.Y. Times, June 24, 2006.[6]

Likewise, a comprehensive 2001 study by Harvard University's Civil Rights Project showed that a large majority of Jefferson County citizens preferred to continue school desegregation efforts, coupled with school choice. Diversity Challenged: Evidence on the Impact of Affirmative Action 115-17 (Gary Orfield and Michal Kurlaender eds., 2001). Only 3% of Jefferson County high school graduates disagreed with the statement that "it is important for my long term success in life that schools have students from different races and backgrounds in the same schools." *See id.* Moreover, roughly 85% of high school seniors surveyed anonymously in Louisville – both black and white – reported that, due to their experience in integrated schools, they had learned much about each other, they were comfortable discussing issues across racial lines, and they felt well equipped to live and work in a diverse society. *See* Gary Orfield, *Everyone Benefits From Diversity*, Hartford Courant, Nov. 30, 2003.

Plainly, the citizens of Jefferson County have come to embrace integrated education. This shift in public attitudes is the legacy of *Brown* and its progeny.

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[6] Indeed, Teddy B. Gordon, counsel for petitioner, ran for election to the Jefferson County School Board in 2004, campaigning on a promise to dismantle the district's desegregation policies. *Id.* The voters of Jefferson County soundly rejected this platform, and Mr. Gordon finished the race in last place. *Id.*

B. Discrimination And Desegregation In Seattle.

The Seattle schools have never been subject to court-ordered desegregation, but school officials have instituted racially sensitive policies to avert litigation premised on Seattle's history of school and residential discrimination. *See* Laura Kohn, Priority Shift: The Fate of Mandatory Busing for School Desegregation in Seattle and the Nation 22-23, 31 (1996). Though Seattle is physically far removed from the Deep South, the city's schools were segregated by official practice and custom until, under threat of litigation, efforts were made in the 1960s and 1970s to combat racial isolation. *See* Quintard Taylor, *The Civil Rights Movement in the American West: Black Protest in Seattle, 1960-1970*, 80 J. of Negro Hist. No. 1, 1, 8 (Winter 1995). Racial isolation in the schools was a consequence of widespread residential segregation in the city, including racially restrictive covenants, which resulted in African American confinement to Seattle's central district. *See id.* at 5-8; *see also Seattle School Dist. No. 1 v. State*, 473 F. Supp. 996, 1001 (1979) (discussing relationship between segregated housing and schools in Seattle).

During the 1960s, civil rights advocates challenged the customs and practices that limited African Americans to the central district. Blacks staged protests for an open housing ordinance in 1963. The protests were turned back by violence that shocked many Seattle citizens. Opponents fired shotguns, burned crosses, and threw incendiary devices onto porches to express their disdain for black access to white neighborhoods. *See* Taylor, 80 J. of Negro Hist. No. 1, at 6. The violent resistance saw success when citizens rejected an open housing ordinance that was placed on the ballot in 1964. Seattle finally passed an open housing ordinance in 1968, and by 1970, blacks were less concentrated in the central district. *See id.* at 7-8.

Despite this progress, housing segregation continued to affect Seattle neighborhoods, resulting in continued school segregation. *See* Kohn at 22. The predominantly black schools suffered from overcrowding and were taxed by the costly, special needs of their students, many of whom were from impoverished backgrounds and required supplemental instruction. *See* Frank Hanawalt and Robert L. Williams, The History of Desegregation in Seattle Public Schools 6-7 (Seattle Public Schools 1981).

Eager to realize *Brown*'s promise in Seattle's schools, civil rights activists and other community members pressed for school desegregation during the 1950s, 1960s, and 1970s. *See id.* at 5-7. They found a receptive audience in the school board and among many members of the community, in part because of Supreme Court rulings that made clear that *Brown*'s mandate applied in areas such as Seattle where there had been no history of *de jure* school segregation. *See Keyes*, 413 U.S. at 189 (discussing standards for imposing school desegregation in Northern and Western areas where segregation had been perpetuated by practice and custom rather than by law); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 456-58 (1979) (establishing presumption of causal relationship between post-1954 racial imbalance and pre-1954 intentional school segregation); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537-38 (1979) (same). The Seattle school board first instituted a voluntary transfer program in 1963; the program dispersed African American students from overcrowded schools in the central district to schools in outlying areas. *See* Taylor at 8; Hanawalt & Williams at 11-14. Thereafter, the board implemented other voluntary desegregation programs with significant community support. "Citizens' councils" and a desegregation task force submitted recommendations, many of which were incorporated into the board's desegregation policies. *See* Larry Collister, A Narrative Account of the Development of Desegregation Goals for the Seattle School

District, 1970-1975 2, 4, 6, 8, 15 (Seattle Public Schools 1975).

In 1978, after years of voluntary school desegregation efforts had failed to eliminate the system's racial imbalances, the board adopted a mandatory desegregation program. The program, called the Seattle Plan, featured student reassignment, busing, and pairing and clustering of schools. *See* Collister at 2; Thomas W. Pullman and Stephen N. Graham, *Measuring the Implementation of Racial Balance Under Formal Constraints*, 4 Educ. Eval. & Policy Stud. No. 1, 109 (Spring 1982); Kohn at 25; Hanawalt & Williams at 35-37. As was true of Seattle's voluntary school desegregation efforts, the Seattle Plan was developed and implemented with significant community input. City residents commented on the plan at meetings held throughout the city, making recommendations that were incorporated by the school board. *See* Hanawalt & Williams at 34.

The Seattle Plan nevertheless spawned fierce resistance. Opponents promoted a state-wide ballot initiative designed to prohibit school districts from reassigning students from neighborhood schools for purposes of achieving desegregation. *See id.* at 41. The initiative passed by a large margin, *see* Kohn at 25, but it was nullified by the Supreme Court in 1982, *see Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982) (holding that initiative denied blacks equal protection of the laws by "using the racial nature of a decision to determine the [governmental] decisionmaking process" and thus imposing unique and substantial burdens on blacks in the political process).

In the years following the *Washington* decision, the Seattle school board turned to school choice policies to ameliorate racial isolation in its schools, garnering widespread support for its efforts, including support from the business community. *See* Kohn at 26, 30. Indeed, the board

turned to school choice as a tool for desegregation as a result of consultation with community members. The board found that many citizens who were proponents of racial balance nevertheless had criticisms of the Seattle Plan, primarily relating to the cost, complexity, and negative effects of its busing component. *See id.* The board responded by reformulating its policies to de-emphasize busing, "rigid desegregation guidelines and mandatory assignments." Kohn at 33; *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1168-69 (9th Cir. 2005) (en banc) (discussing recent history of school board's attempts to diversify schools).

Although data on the percentage of Seattle residents who favor the goal of multiracial schools has not been collected in recent years, the Seattle school board has continued to conduct community outreach in order to confirm that the school assignment policies it develops reflect the priorities of the community. In the mid-to-late 1990s, for example, the school board conducted a series of community forums and focus group sessions designed to solicit input from parents and ensure community support. *See, e.g.*, Jt. App., No. 05-908, at 85-a, 121-a.

The race-sensitive school choice policy that is now before the Court is an outgrowth of the school board's continued community outreach and its effort to realize the promise of *Brown* in Seattle's multiracial environment. *See* Kohn at 33; *Parents Involved in Community Schools* at 1168-69. The board strives for racial diversity not because it is compelled by court order to do so, but because of the value it places on diverse learning environments. Public support for the goal of multiracial schools is a reflection of the slow but steady adoption of the values articulated by the *Brown* Court.

C. The Public Support For Quality, Integrated Education In Jefferson County And Seattle Is Consistent With National Public Opinion.

Although Americans continue to debate the most effective means for combating racial isolation in education, a growing consensus has emerged on the desirability of integrated schools. More than 90% of Americans support racially integrated public schools. *See* Schuman at 126, 246-249. Public approval of integration policies has increased steadily over the years. *See id.* We do not mean to suggest that majority approval can justify an otherwise unconstitutional policy; it plainly cannot. *See Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736-37 (1964) ("[C]onstitutional rights can hardly be infringed simply because a majority of the people choose that it be."). But in light of the value the Court consistently has placed on local-level social experimentation and local control of education, the widespread public embrace of *Brown*'s promise of equal educational opportunity should inform the Court's assessment of the policies challenged here.

III. The Policies Are A Logical Outgrowth Of The Court's Education And School Desegregation Jurisprudence.

The policies reflect the will of the citizens of Jefferson County and Seattle, but they also are logical outgrowths of the Court's education and school desegregation jurisprudence. This precedent repeatedly has emphasized the value of local-level experimentation in the area of education and elected officials' discretion over educational policy matters. *See Swann*, 402 U.S. at 16 ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."). Indeed, the Court has repeatedly called states "laboratories"

for experimentation in the area of education. *See, e.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (noting "[s]tate's freedom to 'serve as a laboratory and try novel social and economic experiments'" and stating that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education") (citation omitted).

In the instant cases, local officials have determined that the policies are necessary to combat racial isolation in and improve their public schools. The school boards are uniquely positioned to make such judgments and the Court should be reluctant to overrule these elected officials' conclusions about how best to manage public schools.

A. The Court Has Consistently Recognized The Importance Of Local Control Of Education And Deference To Local Educational Experimentation.

As the Court has "long observed, 'local autonomy of school districts is a vital national tradition,'" *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (quoting *Dayton*, 433 U.S. at 410), because "[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs," *Bd. of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991). Thus, "responsibility for day-to-day administration of the public schools is best placed at a local level [because] . . . [a]t this level, citizens who have the greatest stake in the school system can have meaningful input in the schools and tailor the education provided in those schools to their own interests . . . ." Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools*, 33 Syracuse J. Int'l L. & Com. 95, 113 (2005); *see also Freeman*, 503 U.S. at 490. ("Where control lies, so too does responsibility."). Put differently, "local

control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (quotation marks and citation omitted).

The Court has emphasized that local control over educational policy is important not only to vest authority in officials who are politically accountable to their communities, but also to foster community support for schools and eliminate bureaucratic obstacles that may delay responses to educational problems that arise. *See Milliken*, 418 U.S. at 741-42 ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."). Positive educational outcomes for students are made possible by the responsive school governance and increased community support that result from local control of schools.

Of course, the principle of local autonomy in education is not a talisman that can be invoked to fend off every Equal Protection challenge, and judicial intervention will be necessary where local control produces invidious discrimination. But where, as here, the outcomes of local control dovetail so closely with the normative values set forth in *Brown*, it would be profoundly ironic for the Court to intervene with a heavy hand and invalidate the local initiatives at issue.

B. Consistent With The Historical Purpose Of K-12 Education, The Policies Reflect The School Boards' Determination That All Students Benefit From Diverse Learning Environments.

The policies do not establish fixed racial quotas or render school assignments solely on the basis of race, but they do take race into account as a secondary factor in some school assignments. They do so to combat the risk that students in Jefferson County and Seattle will attend increasingly racially isolated schools, as they would if officials ignored race entirely. Further, the policies are intended to improve the performance of schools district-wide and to encourage community support for the school systems.

As the courts below acknowledged, the policies were implemented based in part on evidence that racially diverse schools delivered advantages to all students, regardless of race. *See Parents Involved in Community Schools*, 426 F.3d at 1174-75 (noting that district relied on "social science research clearly and consistently show[ing] that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more inclusive experience for all citizens"); *McFarland v. Jefferson Cty. Public Schools*, 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) ("Several [school board] witnesses testified that, in a racially integrated learning environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes."). The school boards' decisions were well founded: reliable studies have shown that racially integrated schools benefit students both educationally and socially. *See generally* Michal Kurlaender and J. Ma, Educational Benefits of Racially and Ethnically Diverse Schools (The Civil Rights Project, Harvard University 2003).

Recently, in recognizing the importance of diversity in higher education, the Court observed that it had "repeatedly acknowledged the overriding importance of preparing students for work and citizenship," and described "education as pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society." *Grutter*, 539 U.S. at 331 (quotation marks and citation omitted). The reasons that make diversity a valid goal in the context of graduate education are even more compelling in the context of elementary and secondary education, because children in grammar and high schools are more impressionable than the older students who attend colleges and graduate schools. *See Comfort*, 418 F.3d at 15-16 (noting "significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages" and detailing expert testimony that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

C. The Policies Are Lawful, De Minimis Efforts To Reform Education Similar To Voluntary Desegregation Programs Repeatedly Upheld By The Federal Courts.

This Court and other courts have repeatedly endorsed educational programs that have taken account of race as one factor in school assignment. Thus, in *Freeman v. Pitts*, the Court noted with approval a program, described as a "marked success," in which students of any race were permitted to transfer to a school in which their race represented less than 50% of the student population. 503 U.S. at 479. Moreover, the federal courts repeatedly have approved school desegregation decrees containing de minimis and often voluntary pupil integration policies such as majority-to-minority transfer programs. *See Swann*, 402 U.S. at 26-27; *Keyes*, 413 U.S. at 241 (Powell, J., concurring in part and

dissenting in part); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Little Rock School Dist. v. North Little Rock School Dist.*, 109 F.3d 514 (8th Cir. 1997); *Little Rock School Dist. v. Pulaski Cty. Special School Dist. No. 1*, 83 F.3d 1013 (8th Cir. 1996); *Stell v. Savannah-Chatham Cty. Bd. of Educ.*, 888 F.2d 82 (11th Cir. 1989); *United States v. Texas Educ. Agency*, 679 F.2d 1104 (5th Cir. 1982); *United States v. Bd. of Educ. of Waterbury, Conn.*, 560 F.2d 1103 (2d Cir. 1977); *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

Similarly, just as the Sixth and Ninth Circuits did in the cases at issue here, the First, Second, and Fourth Circuits have all approved school district policies that acknowledged and recognized students' race without making it a primary, dispositive factor in school assignments. *See Comfort v. Lynn School Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (approving program that acknowledged students' races in permitting "desegregative" transfers);[7] *Brewer v. West Irondequoit Central School Dist.*, 212 F.3d 738, 753 (2d Cir. 2000) (concluding that reducing racial isolation is a constitutionally permissible goal and that "there is no more effective means of achieving that goal than to base decisions on race"); *Riddick v. School Bd. of City of Norfolk*, 784 F.2d 521, 543-44 (4th Cir. 1986) (approving voluntary integration plan that contained "majority-minority" transfer plan that acknowledged students' races in permitting desegregative transfers).

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[7] Like the programs at issue here, the policy upheld in *Comfort* was "a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent," 418 F.3d at 29 (Boudin, C.J., concurring), and which used "race as an express criterion to permit transfers where they are consistent with maintaining schools with a racial mix of students, and to limit transfers where they would increase racial imbalance within the school system beyond certain predetermined limits." *Id.* at 27-28 (Boudin, C.J., concurring).

Like these other race-sensitive programs, the policies here were voluntarily adopted by popularly elected school boards for the benefit of all students, and in response to local support for integrated schools. As such, they should be upheld as consistent with the Court's historic endorsement of local experimentation and control of schools and the vision of educational equality announced in *Brown*.

CONCLUSION

For the foregoing reasons, the decisions of the courts of appeals should be affirmed.

Respectfully submitted,

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